

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SALVADOR TORRES,	§
	§ No. 408, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9804022390
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 29, 2009

Decided: January 19, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

**ORDER**

This 19<sup>th</sup> day of January 2010, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw, and the State’s response thereto, it appears to the Court that:

(1) In July 2009, the defendant-appellant, Salvador Torres, was found to have committed a violation of probation (“VOP”) in connection with his probationary sentences for Assault in the First Degree and Reckless Endangering in the First Degree.<sup>1</sup> On the first VOP, he was re-sentenced to

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<sup>1</sup> In 2001, Torres pleaded guilty to Assault in the First Degree as a lesser-included offense of Attempted Murder, Reckless Endangering in the First Degree, and two counts of Possession of a Firearm During the Commission of a Felony. He was sentenced to a total of 20 years at Level V, which was suspended for a total of 6 years at Level V, to be followed by decreasing levels of supervision.

5 years incarceration at Level V, to be suspended after 3 years for 1 year at Level IV, to be suspended after 6 months for 18 months at Level III probation. On the second VOP, he was re-sentenced to 5 years incarceration at Level V, to be suspended after 4 years for 1 year at Level III probation. This is Torres' direct appeal of his VOP sentences.

(2) Torres' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>2</sup>

(3) Torres' counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Torres' counsel informed Torres of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Torres also was

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<sup>2</sup> *Person v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

informed of his right to supplement his attorney's presentation. Torres responded with a brief that raises several issues for this Court's consideration. The State has responded to the position taken by Torres' counsel as well as the issues raised by Torres and has moved to affirm the Superior Court's judgment.

(4) Torres raises several issues for this Court's consideration, which may fairly be summarized as follows: the Superior Court judge abused his discretion by imposing a VOP sentence in excess of the SENTAC guidelines without giving any explanation, evidencing a closed mind.

(5) The transcript of the July 8, 2009 VOP hearing reflects the following. Torres' probation officer testified that, after Torres was released following his Level V prison term, he failed to report to her for a period of approximately 10 months. Torres, who was represented by counsel, admitted that he had failed to report to his probation officer for a 10-month period, but attributed that failure to his inability to find a place to live. He requested that the judge impose a minimal Level V sentence and release him back to probation.

(6) The judge stated for the record that he had reviewed Torres' file for a couple of hours the previous evening, including Torres' background and the details of his crimes. In one incident, Torres randomly shot a man at

a pay phone, resulting in the man's paralysis and removal of his bladder. In a plea agreement with the State, Torres was able to plead guilty to Assault as a lesser-included offense of Attempted Murder for which he received 5 years at Level V, suspended for 5 years at Level III probation. There also was a civil judgment against Torres in connection with that incident in an amount exceeding \$225,000. Contrary to Torres' statement that this was his first time out on probation, Torres' file indicated that he had failed to report to his probation officer on many occasions while serving previous probations. The judge specifically noted that he considered Torres a dangerous individual who could not be released into the community, at least at this time.

(7) Appellate review of a sentence generally ends upon a determination that the sentence is within the statutory limits prescribed by the legislature.<sup>3</sup> Thus, in reviewing a sentence within the statutory limits, the Court will not find error or abuse of discretion unless it is clear from the record that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.<sup>4</sup> If a VOP is established, the sentencing judge may order the violator to serve the sentence imposed for the original offense, less any Level V time served, or

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<sup>3</sup> *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).

<sup>4</sup> *Id.*

any lesser sentence.<sup>5</sup> The sentencing judge may not, however, impose a sentence greater than that which was originally imposed.<sup>6</sup>

(8) In this case, the VOP hearing transcript reflects that the Superior Court did not sentence Torres to any Level V time beyond what remained on his original sentence. As such, Torres' VOP sentence is legal. Moreover, it is well-settled that the SENTAC guidelines are voluntary and non-binding and do not provide a basis for appeal of a sentence that is within the authorized statutory limits.<sup>7</sup> Finally, the VOP hearing transcript reflects that the judge fully considered Torres' request for leniency and gave detailed reasons for rejecting that request. After listing the mitigating and aggravating factors in Torres' case, the judge gave Torres an additional chance to speak before imposing sentence. There is, thus, no evidence that the judge failed to state the basis for his decision and no evidence that he imposed sentence with a closed mind.

(9) This Court has reviewed the record carefully and has concluded that Torres' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Torres' counsel has made a

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<sup>5</sup> Del. Code Ann. tit. 11, §4334(c).

<sup>6</sup> *Ingram v. State*, 567 A.2d 868, 869 (Del. 1989).

<sup>7</sup> *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

conscientious effort to examine the record and has properly determined that Torres could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice